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Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term 2002

DON FILIPPO SCICCHITANO, CATERINA ANNA SCICCHITANO,
By and through their parents and natural guardians Carmine Scicchitano and Maria Scicchitano; SAMANTHA JO STANVAGE, by and through her Parents and natural guardian Michael Stancavage.

Petitioners

Vs.

MT. CARMEL AREA SCHOOL BOARD

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

DON BAILEY
Attorney for Petitioner
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Harrisburg, PA 17110
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40 pp

QUESTIONS PRESENTED

1.) Does the holding of Tinker v. Des Moines Indep. School District, 393 U.S. 503 (1969) permit a public school district to benefit from the constructive discharge of a student for exercising his 1st Amendment rights?

2.) Did the Court of Appeals erroneously fail to consider the broader and more basic 1st Amendment issues behind the school districts exclusions of numerous protest slogans?

3.) Must school students adapt a Hobbean strategy and stay in a school and, or, confront discipline and face expulsion in order to maintain standing to seek equitable remedies from a federal court?

LIST OF PARTIES

DON FILIPPO SCICCHITANO, CATERINA ANNA SCICCHITANO,
By and through their parents and natural guardians Carmine Scicchitano and
Maria Scicchitano; SAMANTHA HO STANVAGE, by and through her
Parents and natural guardian Michael Stancavage.

Petitioners

MT. CARMEL SCHOOL BOARD

Respondents

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i

LIST OF PARTIES.....ii.

TABLE OF CONTENTS..... .iii

TABLE OF CITATIONS..... iv

OPINIONS BELOW..... 1

STATEMENT OF JURISDICTION.....1

CONSTITUTIONAL PROVISIONS

INVOLVED.....1

STATEMENT OF THE CASE.....2

REASONS FOR GRANTING THE

WRIT..... 6

CONCLUSION..... 7

TABLE OF CITATIONS

Cases Cited: **Page**

Tinker v. Des Moines Indep. School District,

393 U.S. 503 (1969)..... 7

OPINIONS BELOW

On August 26, 20002 the Third Circuit Court of Appeals vacated the October 15, 2001 order of the U.S. District Court for the Middle District of Pennsylvania. The Third Circuit Opinion is appended hereto as Appendix "A". The Opinion of the District Court is also attached hereto. It is Appendix "B".

STATEMENT OF JURISDICTION

The Third Circuit opinion was filed on August 26, 2002. The District Court opinion had been filed on October 15, 2001 and judgment entered on October 23, 2001. The appeal to this Court was timely with Justice Souter granting an enlargement until December 24, 2002 due to the illness of counsel for petitioner. There was no motion to reconsider filed at the Third Circuit. This Court's jurisdiction is invoked as per U.S. Supreme Court Rule 10 (a) and (c) and 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

In the 2000-2001 school year Mount Carmel Area School Board (MCA) adopted a uniform dress code. The school administration disciplined the students for protesting the uniform policy; refused to recognize the students' freedom of speech and restricted the students' freedom of expression. Eventually through progressive discipline MCA forced a constructive dismissal on the students. On October 27, 2000 Petitioners brought a claim (MCA) for violation of the Petitioners civil rights and simultaneously filed a motion for preliminary injunction seeking an immediate hearing. Petitioners sought Injunctive relief, attorneys fees, and costs to enjoin MCA, inter alia, from (1) suspending students under the recently adopted and imposed Uniform Dress Code; (2) enforcing the prohibition against the students wearing of protest logos to school, (3) from placing or transmitting any form of negative comment regarding the students wearing of the protest logos or otherwise violating the Uniform Dress Code, in plaintiff students' or any other student's school records or elsewhere. The students also claimed that Mount Carmel Area School Board did not provide all students with an unfettered public education. The District Court below did not entertain an immediate hearing on the preliminary injunction, but did process the complaint and motion for preliminary injunction in their normal course by scheduling a case management hearing for December 29, 2000. On December 4, 2000, Plaintiffs below filed a motion for temporary restraining order, which the Court denied on January 2, 2001. In denying the request for Temporary Restraining Order, the Court failed to grant the students the

relief they requested, and allowed a continuing violation of the students' Civil Rights.

The within action originally sought declaratory and injunctive relief, attorney's fees, and costs against Defendant MCA for violation of the students' constitutional rights, where the school segregated the children; disciplined the students for protesting the uniform policy; refused to recognize their freedom of speech by restricting the students' freedom of expression protest logo's and also failed to provide all students with a public education, to which they are entitled.

Discovery was concluded on May 25, 2001. On or about May 25, 2001, MCA's filed a Motion for Summary Judgment. On July 6, 2001, the District Court granted the motion in part, and denied it in part. At that point, the only remaining issue was related to the protest logo "Followers wear uniforms leaders don't."

After Discovery was completed and after MCA filed for Summary Judgment, Petitioners attorney Richard Bateman Esquire learned that MCA's School Superintendent allegedly discussed and admitted to destroying documents, tape recordings and/or other discoverable things related to petitioners case, at a school board meeting.

On July 26, 2001 petitioner sought to Amend the case management scheduling Order from the Court seeking to investigate the claims of MCA's destruction of evidence, hoping to avoid premature assertions against MCA about rumors of destroyed evidence, but Petitioners motion was denied by Order dated July 31, 2001.

Pursuant to Local Rule 7.10 Petitioners on or about August 9, 2001, filed for reconsideration of their Motion to amend the scheduling order January 31, 2001 due to the Courts error of fact in its decision, where it misstated the contents of the petitioners brief and to permit the discovery of the claimed destruction of evidence by MCA.

The Court denied petitioners, but sua sponte scheduled a hearing for September 6, 2001, regarding the alleged self proclaimed actions of Superintendent Beierschmitt. Plaintiffs were not afforded an opportunity to investigate nor obtain discovery regarding the alleged destroyed evidence. The Court then suggested that MCA seek sanctions against petitioner for the fated September 6, 2001 hearing scheduled by the Court. Moreover, petitioner was not given an opportunity to discover what other things were destroyed by MCA or its agents, if anything.

Prior to the Court scheduling a date for trial, on or about September 18, 2001 petitioners forwarded their motion for summary judgment on the remaining issue for trial, which was received by the Court on or about September 20, 2001. The Court had already been presented with the issue(s) in petitioners summary judgment motion when it disposed of MCA's summary judgment motion. However, on October 2, 2001, the Court denied Plaintiff's motion as untimely.

As a result of various cumulative events over a period of ten 10 months indicating a possible bias against petitioner, on October 9, 2001, petitioner filed a motion for voluntary recusal of Judge Malcolm Muir which he denied. Trial commenced on October 9, 2001 and was completed on October 10, 2001. An Opinion and Order was issued and filed on October 15, 2001 denying petitioner's relief from the continuing violation of their Civil Rights. The cumulative events mentioned above were a result of a pattern of preferences that developed in favor of MCA and their counsel. MCA consistently filed their pleadings in Harrisburg Pennsylvania. The pleadings were immediately faxed to Williamsport Pennsylvania and disposed of immediately. On at least one occasion a letter dated August 20, 2001 in Harrisburg PA, produced an Order dated August

20, 2001 in Williamsport PA. In another instance, a motion filed on August 30, 2001 in Harrisburg PA produced an Order dated August 30, 2001 in Williamsport, which was not sent to petitioners, by fax, until August 31, 2001. However, petitioners filed their summary judgment motion on the one remaining issue after defendant's motion for summary judgment was granted in part and denied in part. The summary judgment motion of Plaintiffs below was received and filed on September 20, 2001 in Williamsport PA and did not receive any Court action by the Judge until the Order of October 2, 2001 denying summary judgment on the only one remaining issue as untimely filed. The earliest prejudice against the students occurred in the December 20, 2000 and December 27, 2000 hearings before the lower District Court. Judge Malcolm Muir expressed his personal opinion with regard to the clothing worn by plaintiffs, when he referred to the attire as "costumes". By Opinion dated and signed by Judge Malcolm Muir on January 2, 2001 at page 8 paragraph 36, Judge Muir found that "Mr. Scicchitano's claim of a sincerely held religious belief is suspect and appears to be a subterfuge to challenge the school dress code." By Opinion dated September 19, 2001, Judge Malcolm Muir stated that "It is clear to us that Plaintiffs are making a "mountain out of a molehill" and desire to delay these proceedings so that they may go on a discovery "fishing expedition"". It is apparent from these opinions and judicial remarks that there is not only a personal bias against the plaintiffs below, but also a preference for MCA.

In summary, the students filed for a TRO and other injunctive relief against MCA for violating the students' Civil Rights, but were denied, and were caused irreparable harm. The Court denied the students their rights under the First, Ninth, and Fourteenth Amendments of the U.S. Constitution, by granting MCA's motion for summary judgment in part. Petitioners were denied discovery and the

right to investigate facts of evidence of MCA's self-proclaimed destruction of evidence, after the students learned of the events post discovery, and subsequent to MCA's filing for summary judgment. The students' civil rights were further violated by the refusal of Judge Muir to voluntarily recuse himself. The deprivation of petitioner's Freedom of Speech and Civil Rights continues today.

REASONS FOR GRANTING THE WRIT

The Appeals Court did not confront the issues before it. Recusal was an issue the court should have addressed. The case was clearly controlled by the District Court so that issues and matters should have been litigated were not. Carmine Scicchitano, Filippo's father was held up to ridicule by the Court for no reason. His, and Maria Scicchitano's religious feelings are genuine, but regardless Filippo has a mind of his own and sincerely opposes the policy. Carmine has done an incredible amount of work on the case raising many cogent issues. The matter became tragically ad hominum at the District Court level. By not allowing appellants counsel to argue the issues, which was, with all due respect arguably supported at numerous points in the record (with abundant evidence) all of which petitioner had clearly pointed out, the wrong message was sent to the school district. That message was a constructive progenitor of the destruction of petitioners education, including a constructive dismissal of attendance at a public school. The Third Circuit holding requires that a student must either comply with an unlawful policy or run the gauntlet of dismissal or other discipline or lose any chance at equitable remedies.

In their basic form, there are two key issues that should be addressed by this Court. The first is whether a 1st Amendment violation by a school District should be allowed

to continue unabated without any judicial consideration on the merits where the schools disciplinary policy forces a constructive dismissal. The Third Circuit used the petitioners decision to leave school under extremely onerous conditions as the basis to deny standing. The result was effectively a denial of petitioners access to the Courts. Ironically the District Court understood the issue and based its reasoning, albeit erroneously, on its incorrect application of Tinker v. Des Moines Indep. School District, 393 U.S. 503 (1969). Being possessed of 1st Amendment rights in the face of a standard of review that forces a student to either cease protest, and comply with clearly unlawful school prohibitions against expression, or face daily harassment and certain expulsion is simply not fair under any standard of review. The Third Circuit's vacation of the District Courts opinion was an empty gesture which allowed on unlawful constructive discharge to force a student out of school for no reason beyond the lawful exercise beyond the lawful exercise of his 1st Amendment Rights. Tinker is rendered a nullity by the Third Circuit holding. By merely forcing a person out of school, the petitioner's right to go into a federal court and seek injunctive relief makes Tinker a toothless tiger. The Third Circuit opined that petitioner failed to express a desire to attend MCA. If that were the case, why spend the family fortune fighting for your beliefs?

CONCLUSION

The Third Circuit Court of Appeals erred in not addressing the anti Tinker analysis of the District Court and by permitting the improper violator of petitioner's rights to procedural due process when it rewarded the school districts overt harassment of petitioner causing his constructive dismissal and the denial of his rights to attend a public school.

APPENDIX EXHIBIT "A"

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 01-3970

DON FILIPPO SCICCHITANO,
CATERINA ANNA SCICCHITANO, by and through their
Parents and natural guardians Carmine Scicchitano and Maria Scicchitano;
SAMANTHA JO STANVCAVAGE,
By and through her parent and natural guardian Michael Stancavage,

Appellants

v.

MT. CARMEL AREA SCHOOL BOARD

(Amended per Clerk's 1/9/02 Order)

On Appeal form the United States District Court
For the Middle District of Pennsylvania
(D.C.Civil No. 00-cv-01900)
District Judge: Hon. Malcolm Muir

Argued July 22, 2002

Before: SLOVITER, NYGAARD, and BARRY, Circuit Judges

(Filed August 26, 2002)

Richard Bateman, Jr. (Argued)
Devon, PA 19333
Attorney for Appellants

Michele Thorp (Argued)
Thomas, Thomas & Hafer, LLP
Harrisburg, PA 17108-0999
Attorney for Appellants

OPINION OF THE COURT

SLOVITER, Circuit Judge.

Appellants, Don Filippo and Caterina Anna Scicchitano, by and through their parents and natural guardians, Carmine and Maria Scicchitano and Samantha Jo Stancavage, by and through her parent and natural guardian, Michael Stancavage. Sued the Mount Carmel Area School District alleging that the District's new dress code violated their rights under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. The District Court granted summary judgment in favor of the School District on all issues except a First Amendment issue related to clothing displaying the protest slogan: "Followers war unifc.ms, leaders don't". At a bench trial in October 2001, the District Court found in favor of the School District, concluding that the slogan would create a substantial disruption and/or interference with the work of the school and the rights of the other students, and consequently denied the plaintiff's request for injunctive relief and attorney's fees. We will vacate judgment for lack of standing.

I.
BACKGROUND

On June 27, 2000, the School District, pursuant to state authority giving school districts the option to impose dress codes, 24 Pa. Stat.Ann. 13-1317.3 (2002), adopted a dress code that would apply to students in kindergarden through sixth grade beginning that fall and to the entire school district in the following year. The dress code limits the students to certain solid colors for tops and bottoms, specifically, khaki, dark navy, or black for pants and shorts, and red, white, or blue for shirts. Under the policy, shirts may feature the school slogan. The dress code provides that

students may apply for a waiver from the dress code based on religious beliefs or economic hardship.

On September 14, 2000, Don Filippo Scicchitano wore a slogan on his shirt that read, "Followers wear uniforms, leaders don't". The slogan was approximately two inches long and no more than one inch high, and appeared on the upper right hand side of Don Filippo's shirt. School officials decided that the slogan was offensive to other students because it demeaned students who complied with the dress code and suggested that those students were incapable of possessing leadership qualities. The school principal testified that some students came up to her in the hallway to ask why Don Filippo was "allowed to wear that "slogan, but that they did not formally come to her office to complain about the challenged slogan nor, to her knowledge, did they complain to any teachers. App. At 706. The School District's witnesses conceded that there had been no disruption arising from the challenged slogan. However, School officials took Don Filippo out of his regular classroom, placed him in the student support room for the rest of the day, and contacted his parents. Don Filippo wore the slogan again several days later and committed various other dress code violations on other days. Neither Caterina Anna Scicchitano nor Samantha Jo Stancavage was ever disciplined for wearing the "Followers" slogan. No evidence was presented that Samantha attempted or desired to wear the "Followers" slogan.

The School District eventually banned this slogan but allowed students, including the appellants, to wear other slogans that protested the dress code. School officials

concluded that these other slogans were not offensive to other students or likely to cause a disruption in school because they were directed to the school administration and not to other students. There appears to have been no official communication that certain protest slogans were permitted, but in response to this court's questions at argument, counsel for the School District stated that the school did not sanction students for wearing these slogans. The protest slogans that were permitted by the school include the following:

I love MCA, I hate school uniforms.[1] [2]

* God gave us the rainbow, Mount Carmel SD took that away.
* I take the Fifth.
* ....you took away our clothes, what's next, our crayons?
* A uniform is a terrible thing to wear.
* A uniform is a lousy thing to wear.
* Looking alike is absurd.
* The MCA School Board voted and all I got was this lousy uniform.

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[1] The student support room is governed by a certified teacher who oversees the children sent there for various disciplinary reasons. The students are provided with their usual school work while in that room.

[2] There appears to be a factual dispute as to whether any students were disciplined for wearing those other slogans. The evidence seems to show that they were initially disciplined, see App. At 729, but that the School Board later decided to allow students to wear those slogans without sanction.

App. At 113-14.

On October 27, 2000, the plaintiffs filed a complaint in this matter alleging violations of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. At the time, there were six student-plaintiffs. They filed for a temporary restraining order and preliminary injunction against the enforcement of the dress code. The District Court denied both requests. After the conclusion of discovery, the School District filed a motion for summary judgment. The District Court granted summary judgment as to all of the Equal Protection claims and all of the First Amendment claims except for the claim surrounding the propriety of prohibiting clothing bearing the slogan, "Followers wear uniforms, leaders don't". At a bench trial, the District Court found in favor of the School District.

The plaintiffs filed a timely Notice of Appeal as well as a Motion to Remove several plaintiffs, leaving only the two Scicchitano children and Samantha Jo Stancavage, by and through their respective parents. Samantha has completed the sixth grade and the Scicchitano children are presently being home schooled. The District Court found that (t)here was no evidence presented at trial that if the School District allowed students to wear the ("Followers") logo Don Filippo Scicchitano (or) Caterina Anna Scicchitano... would decide to attend public school within the Mount Carmel Area School District". App at 116. Plaintiff's counsel did not contend that this finding was clearly erroneous.

II.
JURISDICTION AND STANDARD OF REVIEW

The District Court had jurisdiction pursuant to 28 U.S.C. §1331 and §1343(a)(3) (4). We have appellate jurisdiction over the District Court's final order pursuant to 28 U.S.C. §1291.

We exercise plenary review over the District Court's interpretation of a constitutional issue. See United States v. Scarfo, 263, F.3d 80, 91 (3d Cir 2001) (citing United States v. Antar, 38 F.3d 1348, 1356-57 (3d Cir. 1994)). In the First Amendment context, the reviewing court has a duty to engage in an independent review of a factual record and need not defer to the District Court's factual inferences. Id. In Scarfo, we noted that the "Supreme Court has emphasized an appellate court's obligation independently to examine the whole record to ensure "that the judgment does not constitute a forbidden intrusion on the field of free expression." Id (quoting Bose Corp. v. Consumers Union of U.S. Inc., 466 U.S. 485, 499 (1984) (quotation omitted)). See also Anar, 38 F.3d at 1357 (noting our broader scope of review of factual [3]findings in First Amendment context than in other areas of law); In re Capital Cities/ABC, Inc. v. Application for Access to Sealed Transcripts, 913 F.3d 89, 92 (3d Cir. 1990) ("This broader review (when we consider First Amendment issues) includes independent consideration of the district court's order and the factual findings inferred from the evidence before it".) (citing Bose, 466 U.S. at 499).

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[3] Additionally, the District Judge denied the plaintiffs' last minute request that he recuse himself from the case. They challenge this decision on appeal but we find no evidence to support any showing of bias and dismiss this challenge without further discussion.

III.

DISCUSSION

Although the complaint in this case raises serious questions about the School District's application of the dress code and its decision to allow the display of some protest slogans but no the "Followers" slogan, we cannot reach the merits of those questions. By the time this case reached trail, the plaintiffs sought only injunctive relief and attorneys fees. Article III of the Complaint requires that a plaintiff retain a legally cognizable interest throughout the pendency of an action. Although the parties did not brief the issues of mootness and standing, we have an obligation to consider them sua sponte and do so now.

The Scicchitano children no longer attend school in the Mount Carmel School District and thus are no longer governed by the challenged dress code policy. Leaving a school district often moots a claim for injunctive relief against that district. See, e.g. Penderson v. La.St. Univ, 213 F.3d 858, 874-75 (5th Cir. 2000) (finding injunctive claims mooted by students graduation); Fox v. Bd. Of Trustees of the State Univ of N.Y., 42 F.3d 135, 140 (2d Cir. 1992) (same). Although we have found that graduation from a school does not automatically render a case moot if the claims are "capable of repetition, yet evading review", that exception does not apply here. See Brody err el, Sugzdines v. Spang, 957 F.2d 1108, 1113-15 (3d Cir 1992) (concluding that challenge to religious speech in a graduation ceremony was not moot because length of senior year was too short to complete litigation and the plaintiff-parents who had younger children were planning to return to the school system, we

might be able to find that this claim was capable of repetition, but they never established in the record that they would return to the School District if they were permitted to wear this slogan. See App. At 1234, 1238 (indicating that they were being home schooled in protest of the entire dress code and at the direction of mental health professionals). Further, the Scicchitano children are not on the verge of graduating from the school district and thus, were they in school, enough time would remain for them to fully litigate this issue, unlike the students in Brody.

Samantha Jo Stancavage, who does remain within the School District, has not met her burden of showing an actual or imminent injury that would give her standing to pursue this claim. In order to have standing to seek injunctive relief, the plaintiff must show that (1) she is likely to suffer future injury, (2) she is likely to be injured by the defendant, and (3) the relief she seeks will likely prevent the injury from occurring. See Roe v. Operation Rescue, 919 F.2d 857, 864 (ed Cir. 1990), 15 James Wm. Moore et al., Moore's Federal Practice, '01.61(b)(6) (3d ed. 2002). In an action under the First Amendment, courts apply an expanded notion of standing. "(In the First Amendment context, "litigants....are permitted to challenge to statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." Va. V. Am. Booksellers Ass'n, 484 U.S. 383, 392-93 (1984) (quoting

Sec'y of State of Md. V. Joseph H. Munson Co., 467 U.S. 947, 956-57 (1984) (quotation omitted)).

As the District Court found, Samantha never wore a protest slogan, despite a failed attempt to iron onto one of her shirts, and plaintiffs did not demonstrate that the slogan she tried to iron on was the challenged slogan. She never indicated that she wanted to wear the challenged slogan, nor was she disciplined by the school for wearing an article of clothing displaying any protest slogan (although she was disciplined for other dress code violations). The mere possibly of future injury does not satisfy the requirements of Article III. "In cases where a plaintiff seeks injunctive or declaratory relief only....standing will not lie if adjudication....rests upon contingent future events that may not occur as anticipated or indeed may not occur at all". Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548, 561 (ed Cir 2002) (second ellipsis in original) (quotations omitted). Without evidence that Samantha wanted to wear this slogan and that she deterred only be fear of sanction, she had not met the standing requirements of Article III.

Because these claims are not presently justifiable and were not at the time of trial, we cannot reach the interesting issue of whether the School District's policy violates the standard for regulation of student speech set forth in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), nor are we able to reach the application of this court's recent decision in Saxe v. State College Area School District, 240 F.3d 2000 (3d Cir. 2001).

IV.
CONCLUSION

Because the record evidence does not demonstrate that the plaintiff-appellants have met the requirements for standing or mootness, we will vacate the judgment of the District Court with direction to dismiss for lack of standing. See FW/PBS, Inc., v. City of Dallas, 493 U.S. 215, 235-36 (1990); Pub Interest Research Group of N.J. v. Magnesium Elektron, 123 F.3d 111, 117 n.5 (3d Cir 1997).

TO THE CLERK:

Please file the foregoing opinion

/s/ Dolores K. Sloviter
Circuit Judge

APPENDIX EXHIBIT "B"

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ANTHONY J. GRECO, JR., et al.,	:	
	:	**:No. 4: CV-00-1900**
Plaintiffs	:	
	:	
v.	:	
MOUNT CARMEL AREA SCHOOL BOARD,	:	**:(JUDGE MUIR)**
	:	
Defendant	:	

OPINION

MUIR, District Judge.

I. Introduction

The Plaintiffs in this action are several students attending school within the Mount Carmel Area School District. On October 27, 2000, Plaintiffs by and through their parents and natural guardians filed a complaint against Defendant Mount Carmel Area School Board alleging that their rights under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment are being violated by a Standard Dress Code adopted on or about June 30, 2000, by the Mount Carmel Area School Board. At the time the complaint was filed Plaintiffs and their grades in school were as follows:

Devin Ulcerski	High School Student
Don Fillippo Scichitano	Sixth Grade
Caterina Anna Scicchitano	Fifth Grade
Anthony J. Greco, Jr.	Fifth Grade
Samantha Jo Stancavage	Fifth Grade

Brandon A.L. Greco Kindergarten

On October 10, 2001, counsel for Plaintiffs withdrew the claims of Devin Ulceski.

The case management plan filed with the court on January 24, 2001, states that Plaintiffs are requesting only injunctive relief and attorney's fees and expenses.

On May 25, 2001, Defendant filed a motion for summary judgment. By order of July 6, 2001, we granted in part and denied in part the motion for summary judgment filed by Defendant.

Plaintiffs' claim under the Equal Protection Clause of the Fourteenth Amendment and their claim that the Standard Dress Code violates their First Amendment rights were dismissed. We conclude that the only expressive activity implicated in this case is the ability of the students to protest the dress code. Although school officials have permitted students to wear several protest logos, they have not permitted students to wear the logo "Followers wear uniforms, leaders don't."

This case was placed on the September, 2001, trial list. The only remaining issue in this case relates to the logo "Followers wear uniforms, leaders don't." That issue is whether permitting students to wear that logo would substantially disrupt or interfere with the work of the school or the rights of other students.

On July 26, 2001, Plaintiffs filed a motion to amend the case management order and a brief in support thereof. Plaintiffs requested an additional ninety (90) days to conduct discovery.[4] By order of July 31, 2001, we denied Plaintiffs' motion because Plaintiffs had not demonstrated good cause for an additional 90 days to conduct discovery.

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[4] Order #1 of January 31, 2001, issued after the case management conference provided, inter alia, that "(a)ll discovery shall be completed by May 25, 2001."

On August 9, 2001, Plaintiffs filed a motion for reconsideration of our order of July 31, 2001. In that motion Plaintiffs claimed that Defendant's School Superintendent Richard Beierschmitt admitted at an April 2001 School Board Meeting that he had destroyed evidence which should have been turned over to Plaintiffs during discovery. By order of August 28, 2001, we denied Plaintiffs' motion for reconsideration. However, in the light of Plaintiffs' allegation that Superintendent Beierschmitt had admitted that he had destroyed evidence, we scheduled a hearing to determine whether or not any evidence was destroyed which was relevent to the remaining issue in this case. That hearing was held on September 6, 2001.[5] On September 19, 2001, we issued an 18-page opinion in which we found that Plaintiffs had failed to establish that any relevant or material evidence was destroyed by Superintendent Beierschmitt. The order attached to that opinion scheduled trial of the remaining issue to commence at the first opening in our trial

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[5] At that hearing counsel for Plaintiff appeared to contend that he was not afforded enough time to prepare for the hearing. He also noted that one of his witnesses did not appear. However, counsel did not ask for a continuance of the hearing. We also informed counsel that we set aside both Thursday and Friday for the hearing. Our order scheduling the hearing for September 6, 2001, was issued on August 28, 2001. That order directed the Clerk of Court to FAX a copy of the order to counsel who could be so reached, read the dispositive provision of the order to other counsel over the telephone and mail a copy to each counsel. Deputy Clerk Kathy Fry attempted to FAX a copy to counsel for Plaintiffs without success on August 28, 2001. She then left a message on counsel's telephone answering machine regarding the order. Deputy Clerk Fry spoke to counsel for Plaintiffs on August 29, 2001, and faxed a copy of the order to him.

calendar occurring on or after October 9, 2001. In accordance with that order trial commenced on October 9, 2001, and concluded on October 10, 2001. The following are the court's findings of fact, discussion and conclusions of law.

II. Findings of Fact.

1). In or about January, 2000, a number of individuals on behalf of Defendant Mount Carmel Area School District began to research and investigate the possibility of developing a revised standard dress code and policy for the school district. (Undisputed, hereinafter "U")

2). The impetus for the investigation and research was at least in part various tragedies involving violence at schools throughout the country. (U)

3). The research and investigation included contacting representatives from other school districts which had implemented school dress codes, reviewing other districts' dress codes, and reviewing research regarding the effect of school dress codes. (U)

4). The Mount Carmel Area School Board authorized sending a survey home to parents of Mount Carmel Area students to determine if there was parental interest in adopting a dress code. (U)

5). The responses to the survey indicated a small majority of the parents were in favor of adopting and implementing a dress code in the Mount Carmel Area School District. See Doc. 29, Opinion issued January 2, 2001, Finding of Fact No. 5; Doc. 34, transcript of preliminary injunction hearing, 81.

6). At least one open meeting was held for parents of students to discuss the adoption of a dress code. (U)

7). On June 15, 2000, the Mount Carmel School Board voted on the issue of whether to adopt the proposed standard dress code policy. (U)

8). The Mount Carmel Area School Board voted in favor of the standard dress code policy. (U)

9). On June 27, 2000, the current standard dress code policy was officially adopted. (U)

10). Defendant Mount Carmel Area School District sent an explanatory letter to the students' parents, along with a copy of the standard dress code policy in June of 2000.

11). The dress code which was adopted in June of 2000 only applied to kindergarten through sixth grade students.

12.) That dress code policy provides in relevant part as follows:

BOYS:

Khaki/dark navy and black slacks (No cargo or baggy style).

Khaki/dark navy and black shorts–approved length (No cargo or baggy style).

Red, white, navy blue long or short sleeve golf shirt or button down dress shirt with or without approved school logo.

Shoes, sneakers, coordinated socks.

Approved accessories–sweaters, sweatshirts, turtlenecks, mock turtlenecks–red, white, navy blue with or without school logo.

Gym clothing–sweat pants, shorts, appropriate shirts.

GIRLS:

Khaki/dark navy and black slacks (No cargo or baggy style).

Khaki/dark navy and black shorts–approved length, no more than 3 inches above the knee (No cargo or baggy style).

Red, white, navy blue long or short sleeve golf shirt or button down dress blouse with or without approved school logo.

Shoes, sneakers, coordinated socks.

Shorts, skirts and jumpers, khaki, dark navy blue or black must be no more than 3 inches above the knee.

Approved accessories–sweaters, sweatshirts, turtlenecks, mock turtlenecks–red, white, navy blue with or without school logo.

Gym clothing–sweat pants, shorts, appropriate shirts.

Underclothing is not permitted to be seen through outer clothing. Clothing must be of proper fit, not to exceed one size beyond correct size. Hats, bandanas, headbands, chains are not permitted. New students entering Mt. Carmel Area School District shall be granted a grace period of two weeks before being required to conform with the dress code. Mutilation, i.e., purposely cutting holes or tearing of clothing is prohibited. Jeans of any color are not permitted. Principals can use their discretion to designate specific days that permits students to wear other types of clothing. (U)

13). The above policy with one amendment which permits girls to wear caprisis the policy currently in effect at the Mount Carmel Elementary School. (U)

14). That amendment was approved in October, 2000. (U)

15). There were several reason for the adoption and implementation of the
standard dress code policy, including promoting discipline and order in the school, encouraging nonviolent behavior, improving the self-image of students, improving test scores and addressing economic disparity in the area. (Undisputed, but objected to, hereinafter "U.O.")[6]

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[6]We have included all of the defendant's proposed findings of fact that were undisputed, but objected to. By including those findings of fact we are overruling the objections thereto.

16). Economic hardship waivers are available pursuant to the standard dress code policy. (U)

17). There is a fund set up to assist parents who have difficulty purchasing
clothing which is consistent with the school dress code policy. (U)

18). The standard dress code policy applies to students while they are in school during instructional hours. (U.O.)

19). The purpose of the dress code is stated in the policy as follows:

The Mount Carmel Area Board of Education recognizes every student's right to freedom of speech, written or oral, as that right is guaranteed by the United States Constitution and the United States Supreme Court. The Board also recognizes its' obligation to provide schools where the health, safety and welfare of the students who attend our schools are given paramount consideration and where a positive learning environment must be maintained. The Board is aware of its' obligation to make every effort to minimize the opportunities for student disruption and/or distraction in the school. The Board believes that a standard dress code policy will address issues related to the health, safety and welfare of the students and the maintenance of a positive learning environment.
(U)

20). There is presently a procedure set up for any student to obtain a religious waiver of the dress code. (U)

21). This procedure requires the parents to obtain a letter from a minister of a bonafide religious faith demonstrating that the parent or child has a sincerely held religious belief. (U)

22). Mr. Scicchitano testified that he is a minister of the Universal Life Church. (U)

23). Mr. Scicchitano obtained a waiver because he submitted a letter over his signature stating that he was a

minister and that adhering to the colors of clothing set forth in the dress code would violate his religious faith. See Doc. 29, Opinion issued January 2, 2001, Finding of Fact No. 34; Doc. 35, transcript of preliminary injunction hearing, 99-105; Doc. 34, transcript of preliminary injunction hearing, 84-86 and 110-113.

24). Don Fillippo Sciccitano testified during the preliminary injunction hearing that prior to the adoption of the school dress code he and other children did not wear liturgical colors on any specified days. (U)

25). On September 24, 2000, Plaintiff Don Fillippo Scicchitano wore a logo which stated "Followers wear uniforms, Leaders don't." (U)

26). The logo was degrading and demeaning to other students. See testimony of Cherly A. Latorre at trial; see also, e.g., Doc. 34, transcript of preliminary injunction hearing, 182-183.

27). The logo created a potential for disturbance, disorder and disruption at the school. Id.; testimony of Superintendent Beierschmitt, Mary Ann Krakowski and Bart A. McCollum at trial.

28). Defendant Mount Carmel Area School District wished to maintain a stable educational environment. Id.

29). On September 14, 2000, Plaintiff Don Fillippo Scicchitano was placed in the student support room and his parents were contacted. (U)

30). On the same date, one of Plaintiff Don Fillippo Scicchitano's parents came to the school, picked him up and took him home. (U)

31). The parents of Don Fillippo Scicchitano were advised that he could return to class if a change of clothing were brought to the school. (U)

32). On September 19, 2000, Plaintiff Don Fillippo Scicchitano wore the aforesaid logo, as well as a Pokemon logo. (U).

33). On September 19, 2000 Plaintiff Don Fillippo Scicchitano was placed in the student support room. (U)

34). On September 28, 2000, Plaintiff Don Fillippo Scicchitano wore a nonconforming style of clothing to school. (U.O.)

35. Plaintiff Don Fillippo Scicchitano was placed in the student support room. (U)

36.) On October 20, 2000 Plaintiff Don Fillippo Scicchitano wore a nonconforming style of clothing to school. (U.O.)

37.) Plaintiff Don Fillippo Scicchitano was placed in the student support room. (U)

38.) On November 20, and 21, Plaintiff Don Fillippo Scicchitano wore clothing that was in violation of the standard dress code policy due to improper styles. See Plaintiff's trial exhibit No. 5.

39.) On the aforesaid dates, Plaintiff Don Fillippo Scicchitano was placed in the students support room. (U.O.)

40.) At least two meetings were held between school officials and Mr. Sciccitano as parent of Don Filippo. (U)

41.) After each of those meetings, Mr. Sciccitano permitted his son to go to school wearing clothing that was in violation of the school dress

42.) On November 29, 2000 Don Filippo Scicchitano wore clothing that violated the school dress code and received an out of school suspension.(U)

43.) On December 4, 2000 Don Filippo Scicchitano wore clothing that violated the school dress code and received an out of school suspension. (U).

44.) Caterina Scicchitano was never placed in the student support room or disciplined for wearing the logo "Followers wear uniforms, leaders don't". Doc. 34 transcript of preliminary hearing, 62-63.

45.) The student support room has as aide and a certified teacher to oversee and educate the children. (U).

46.) The children are provided with school work in the student support room. (U).

47.) A log is kept as to when children are placed in the student support room, but no permanent record is made. (U).

48.) The fact that a student has been sent to the student support room is not noted anywhere on the students' permanent file. (U).

49.) Out of school suspensions are noted on the student's file, but the notations are destroyed at the end of each school year. (U).

50.) Plaintiffs have only been placed in the student support room or suspended because of improper styles, colors, and unauthorized or offensive logos. (U.O.)

51.) The authorized logos included cartoon characters and the word "Logo". (U.O.).

52.) On at least one (1) occasion, Plaintiff Don Filippo Scicchitano has worn the logo "I love MCA, I hate school uniforms." (U).

53.) No disciplinary action was taken as a result of the logo set forth in the preceding paragraph. (U.)

54.) Defendant Mount Carmel Area School District permits students to wear clothing that complies with the dress code with logos that state "I love MCA, I hate School uniforms.: (U).

55.) Defendant Mount Carmel Area School District permits students to wear clothing that complies with the dress code with logos that state "God gave us the rainbow Mount Carmel SD took that away". (U).

56.) Defendant Mount Carmel Area School District permits students to wear clothing that complies with the dress code with logos that state "I take the Fifth". (U).

57.) Defendant Mount Carmel Area School District permits students to wear clothing that complies with the dress code with logos that state "....you took away our clothes, what's next, our crayons?" (U).

58.) Defendant Mount Carmel Area School District permits students to wear clothing that complies with the dress code with logos that state "A uniform is a terrible thing to wear" (U).

59.) Defendant Mount Carmel Area School District permits students to wear clothing that complies with the dress code with logos that state "A uniform is a lousy thing to wear". (U).

60.) Defendant Mount Carmel Area School District permits students to wear clothing that complies with the dress code with logos that state "Looking alike is absurd." (U).

61.) Defendant Mount Carmel Area School District permits students to wear clothing that complies with the dress code with logos that state "The MCA School Board voted and all I got was this lousy uniform. (U.O.)

62.) Mount Carmel Area School District permits protest logos that are not degrading or demeaning to other students in the school district. (U.O.)

63) Although teachers have not always enforced the dress code policy consistently in part because it went into force only at the end of August 2000, it has not been applied in an arbitrary and capricious manner. (U.O.)

64.) Teachers have been advised by the school administration to enforce the dress code policy and apply it consistently. (U).

65.) The only remaining plaintiffs in this action are Don Filippo Scicchitano, Caterina Anna Scicchitano, Anthony J. Greco, Jr., Brandon A.L. Greco, and Samantha Jo Stancavage.

66.) Plaintiff Samantha Jo Stancavage is currently a sixth (6^{th} grade student at Mount Carmel Area elementary school (U).

67.) Plaintiff Samantha Jo Stancavage is not permitted to wear the "Followers wear uniform, leaders don't logo in school. (U).

68.) No evidence was presented at trail that Samantha Jo Stancavage while attending Mount Carmel Area Elementary School wore the logo "Followers wear uniforms, leaders don't".

69.) There was not evidence presented at trial indicating that Samantha Jo Stanvage desires to wear the logo "Followers wear uniforms, leaders don't".

70.) No evidence was presented at trial that Anthony J. Greco, Jr., while attending Mount Carmel Elementary School wore the logo "Followers wear uniforms, leaders don't."

71.) No evidence was presented at trial that Brandon A.L. Greco while attending Mount Carmel Elementary School wore the logo "Followers wear uniforms, leaders don't".

72.) Don Filippo Scicchitano was formerly a student in the Mount Carmel Area School District. (U).

73.) Caterina Ann Scicchitano was formerly a student in the Mount Carmel Area School District.

74.) Anthony J. Greco, Jr., was formerly a student in the Mount Carmel Area School District.

75.) Brandon A.L. Greco was formerly a student in the Mount Carmel Areas School District.

76.) The Scicchitano and Greco children are presently receiving home schooling.

77.) There was no evidence presented at trial that if the School District allowed students to wear the aforesaid logo Don Filippo Scicchitano, Caterina Anna Scicchitano, Anthony J. Greco, Jr., or Brandon A.L. Greco would decide to attend public school within the Mount Carmel Area School District.

78.) None of the plaintiffs have been singled out or treated differently from similarly situated students.

79.) All of the remaining plaintiffs other than Samantha Jo Stanvage have chosen to leave the public school system and receive homes schooling.

80.) There were no fights caused by the logo "Followers wear uniforms, leaders don't". (U).

81.) Other students were offended by the logo and made comments to Mary Ann Krakowski, the elementary school principal, to the effect "Why is he wearing that logo". Testimony of Mary Ann Krakowski at trial.

82) The logo "Followers wear uniforms, leaders don't" is offensive because it suggests that those who comply with the school dress code have no leadership potential. Testimony of Cheryl A. Lattore at trial; see also, e.g. Doc 34, transcript of preliminary injunction hearing, 182-183.

83.) A student wearing the logo "Followers wear uniforms, leaders don't is potentially disruptive of the mission of the elementary school to foster a safe and caring environment for its students. Id.

III. DISCUSSION

On June 6, 2001 we issued an order granting in part and denying in part Defendant's motion for summary judgment. In that order we held that the dress code per se does not violate plaintiff's First Amendment rights and that the only expressive activity implicated in this case is the ability of the students to protest the dress code.

School officials have permitted students to wear several logos protesting the dress code. The one logo which they have not permitted students to wear, as noted in Part II of this Opinion, is "Followers wear uniforms, leaders don't".

The most important case dealing with student speech is Tinker vs. Des Moines Independent Community School District, 393 U.S. 503 (1969). The Tinker case involved a protest of the Vietnam War by the high school and junior school students. The students demonstrated their opposition to that war by wearing black armbands. The students were suspended for doing so. In holding that the suspensions violated the First amendment the Supreme Court in Tinker stated:

The problem posed by the present case does not relate to regulation of the length of skirts, or the type of clothing, to hair style, or deportment. It does not concern aggressive, disruptive action or even group demonstration. Our problem involves direct, primary First Amendment rights akin to "pure speech". The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder of disturbance on the part of petitioners. There is hereto no evidence whatever of petitioner's interference, actual or nascent, with the school's work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the school or the rights of other students.

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The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, the deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk… and our history says that it is this risk… and court history says that it is this sort of hazardous freedom –this kind of openness – that is the basis of our national strength and of the independence and vigor of

> Americans who grow up and live in this relatively permissive, often disputations, society.
>
> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular view point. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school". The prohibition cannot be sustained.

Id. At 507-509 (citations omitted). The Court of Appeals for this circuit recently commented on Tinker and its progeny. The court state that "[u]nder Tinker…regulation of student speech is generally permissible only when the speech would substantially disrupt or interfere with the work of the school or the rights of other students. As subsequent federal cases have made clear, Tinker requires a specific and significant fear of disruption, not just some remote apprehension of disturbance." Saxe v. State College Area School District, 240 F.3d 200, 211 (3d Cir 2001). The Court of Appeals further pointed out that "since Tinker, the Supreme Court has carved out a number of narrow categories of speech that a school may restrict even without the threat of substantial disruption". Id. At 212 those "narrow categories" which are not present in this case involve lewd, vulgar or profane language or school property and the regulation of school-sponsored speech, such as a student newspaper. Id. At 213-214.

The Court of Appeals for this circuit in Saxe refers to one case that is somewhat similar, but also dissimilar to the present case. That case is Chandler v. McMinnville School

District, 978 F.2d 524 (9th Cir 1992). The case involved the discipline of middle school students for wearing "SCAB buttons to protest replacement teachers during a strike. The district court dismissed the students complaint. The Court of Appeals for the Ninth Circuit concluded that the "SCAB" buttons were not "inherently disruptive" and reversed and remanded to permit the students to pursue their Fist Amendment claim.

In the present case the logo in question is not directed at teachers but at other students. The reason the school administration prohibits the logo "Followers wear uniforms, leaders don't is because it is directed at other students and demeans other students by suggesting that if students comply with the dress code they have no leadership potential. The school administration is also concerned about the possible disruption, including fighting among students that could be caused by permitting students to wear the logo. Plaintiffs did not present any evidence rebutting that presented by Superintendent Bierschmitt, Principal Krakowski, Assistant Superintendent Lattore or Mr. McCollum. Those four educators testified based on their many years of experience that the logo had the potential to disrupt or interfere substantially with the work of the school and that one of the missions of the school is to create a caring and safe environment and to foster leadership qualities in students. We will not second guess the judgment of four experienced substantially interferences with the work of the school and demeans those students who do not wear particular logo.

We also note that Tinker dealt with black armbands worn by junior high and high school students to protest the Vietnam wore. Tinker, in contrast to the present case, did not concern speech or action that intruded upon work of the school or the rights or other students. In Tinker no statements were made demeaning other students. Furthermore, we are not convinced that the standard enunciated in Tinker applied

to the elementary school setting. See Muller vs. Jefferson Lighthouse School, 98 F.3d 1530 (7th Cir 1996). Counsel for plaintiff has not provided us with any case that so indicates and we are unaware of any such case in this circuit.

The only Plaintiff presently attending public school within the Mount Carmel Area School District is Samantha Jo Stancavage who is in the sixth grade. Although Don Filippo Scicchitano presently is at the 7th grade level but it not in public school, there was no testimony that if we entered an injunction against the School District directing that it permit 7th through 12th grade students to wear the logo "Followers wear uniforms, leaders don't he would attend public school within the Mount Carmel Area School District. However, we are satisfied that even in the junior high and high school setting that the standard enunciated in Tinker has been met by defendant. We will, therefore enter judgment in favor of Defendants and against plaintiffs.

IV. CONCLUSIONS OF LAW

Defendant has established by a preponderance of the evidence that permitting the logo "Followers wear uniforms, leaders don't" would substantially disrupt or interfere with the work of the school or the rights of other students.

An appropriate order will be entered.

MUIR
United States District Judge

Date: October 15, 2001